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IN THE
SUPREME COURT OF THE UNITED STATES

Miguel Azor, an infant under the age of 14 years, by his natural guardians, Harold Azor and Yvonne Azor;
and Harold Azor and Yvonne Azor, individually,
Petitioners

vs.

Cardinal Lodging Group, Inc., Cardinal Industries, Inc., a/k/a Cardinal Industries, Incorporated, Red Bird Management, Inc., and Knights Inn East, Ltd.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Counsel of Record:

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46 pp

QUESTIONS PRESENTED

(1) May a Defendant withhold expert witness testimony which establishes negligence on the part of that Defendant by refusing to file the original deposition of such expert, and argue in a Motion for Summary Judgment that no evidence of any negligence exists, when Defendant has retained in its own files that very evidence of negligence, or does such action violate the requirements for deciding Motions for Summary Judgment imposed by the United States Supreme Court in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.E. 2d 265 (1986)?

(2) In a drowning case arising under Florida law resulting in permanent brain damage to an eight year old male child, may the trial court grant summary judgment on the issue of foreseeability because a sign was placed in the pool area stating that minors should not be in the pool area without being accompanied by an adult, reasoning that it was unforeseeable that such a drowning would occur because no one would disobey the warning on the sign, or does such a ruling on foreseeability violate Rule 56 of the Federal Rules of Civil Procedure and binding precedent established by Keating v. Jones Development of Missouri, Inc., 398 F.2d 1011 (5th Cir. 1968) which holds, in a similar swimming pool case arising under Florida law, that foreseeability "is a matter for the jury to decide"?

LIST OF PARTIES INCLUDING PARENT AND SUBSIDIARY CORPORATIONS

Counsel of record for Petitioners certifies that the following listed parties, including parent and subsidiary corporations have an interest in the outcome of this case.

Parties: Harold Azor

Miguel Azor, an infant under the age of 14 years, by his natural guardians, Harold Azor and Yvonne Azor

Yvonne Azor

Cardinal Industries, Inc., a/k/a Cardinal Industries, Incorporated

Cardinal Lodging Group, Inc.

Knights Inn East, Ltd.

Red Bird Management, Inc.

Other Interested Entities: Continental Casualty Company

Affiliates of CNA Insurance Companies: American Casualty Company of Reading Pennsylvania

CNA Casualty Company of California

CNA Casualty Company of Puerto Rico

Columbia Casualty Company

National Fire Insurance Company of Hartford

Transportation Insurance Company

Valley Forge Insurance Company

TABLE OF CONTENTS AND CITATIONS

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES INCLUDING PARENTS AND SUBSIDIARY CORPORATIONS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW vi

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED vi

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

REASONS FOR GRANTING THE WRIT 3

CONCLUSION 18

APPENDIX "A" A-1

APPENDIX "B" B-1

APPENDIX "C" C-1

APPENDIX "D" D-1

TABLE OF AUTHORITIES

Celotex Corp. v. Catrett,
477 U.S. 317, 106 S.Ct. 2548, 91 L.E.2d
265 (1986) . i, 10, 11, 21, 22, 23, 24

Keating v. Jones Development of Missouri,
Inc.,
398 F.2d 1011 (5th Cir. 1968)
. . . . ii, 24, 25, 26, 27, 28, 30, 32

FRAP 10(e) 5, 16

Rule 56 of Federal Rules of Civil
Procedure 2, 22

W. Prosser & W. Keeton, The Law of Torts
§42, at 273 (5th ed. 1984) 25

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not reported. A copy of same is attached hereto as Appendix A. The Court of Appeals' denial of Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc (without further opinion) is not reported and is attached hereto as Appendix B. The opinion of the United States District Court for the Middle District of Florida, Orlando Division is not reported. A copy of same is attached hereto as Appendix C. A photograph of the subject sign is attached hereto as Appendix D.

JURISDICTION

Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc respecting the decision of the Court of Appeals dated February 22, 1994 was denied by the Court of Appeals on July 18, 1994. This Petition for Writ of Certiorari was filed within 90 days of the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Rule 56 of the Federal Rules of Civil Procedure:

> "(a) For Claimant. A Party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after

service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all of any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel,

shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set

forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt."

2. Rule 10(e) of the Federal Rules of Appellate Procedure:

"If any difference arises as to whether the record truly discloses what occurred in the district court,

the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

STATEMENT OF THE CASE

The trial court issued an order granting Respondents-Defendants' (hereinafter "motel owners" or "Defendants") Motion for Summary Judgment (R5-143-5), finding that the Petitioners-Plaintiffs' (hereinafter "Azors" or "Plaintiffs") claims were non-meritorious as a matter of law because the motel owners had placed a sign warning against leaving children under the age of twelve and non-swimmers alone at the pool without a responsible adult being present. The trial court determined that it was not foreseeable to the motel owners that the warnings would not be obeyed, and that such a drowning could occur. The trial court also found that there were no facts in dispute, and that no evidence existed that the motel owners breached a duty of care which proximately caused Plaintiff Miguel Azor's injuries. (R5-143-13)

Subsequent to the ruling of the trial court it was discovered that the motel owners had not filed with the court the original deposition of the Azors' aquatic expert witness, James Lance, Ph.D., which had been sent to them by the court reporter. The Azors filed a motion with the trial court to have that deposition made a part of the record, which motion was denied by the trial court. The Azors then filed a motion with this court asking that the deposition be made a part of the record which was denied by this court. The motel owners filed a Motion to Strike those portions of the Azors' briefs making reference to Dr. Lance's testimony, which motion was granted contemporaneously with the panel decision, without opinion, affirming the judgment of the trial court.

STATEMENT OF FACTS

On July 25, 1989, Harold and Yvonne Azor and their three children, Harold, Jr., age 2, Jonathan, age 4 and Miguel, age 8, were on vacation in Orlando, Florida. The Azor family checked into the Knight's Inn Motel and went to the swimming pool. The subject swimming pool is located at one end of a building having no windows or doors opening in the direction of the pool. There is a pool house across the back of the pool and trees near the pool as well. Finally, a solid wood fence approximately five feet high surrounds the pool. No lifeguards or other attendants were present at the pool and there was no television monitoring system.

After playing at the pool for a short time, the family returned to the motel room, whereupon Harold, Sr. and Jonathan went to a grocery store. Miguel asked his mother if they could return to the pool. Yvonne and Miguel, along with the youngest son, Harold, Jr., returned to the pool. While at the pool, Harold, Jr. began to fall asleep and Yvonne Azor took him back to the motel room. Miguel Azor asked his mother if he could stay at the pool while she was at the motel room and she agreed. One could see the fence surrounding the pool from the Azor's room, but it is not possible to see the surface of the pool. Yvonne Azor checked on Miguel on one occasion a few minutes after she went to the room and found Miguel sitting in a chair in the pool area, in the same position at the pool where she had left him. When Harold Azor returned from the grocery store, he asked Yvonne where Miguel was since he had not seen him at the pool. Yvonne then ran back to the pool area and discovered Miguel at the bottom of the pool.

Another guest at the motel pulled Miguel from the pool. Harold Azor, a trained emergency medical technician, administered CPR to his son. Miguel was then taken by ambulance to the nearest hospital. (Deposition of Yvonne Azor, pp. 10-43; Deposition of Harold Azor, p. 43). Miguel Azor suffered severe brain damage as a result of oxygen deprivation. He will remain in a coma for the rest of his life. The Azors brought suit against the owners and operators of the motel alleging negligence in the operation, maintenance and supervision of the motel pool.

REASONS FOR GRANTING THE WRIT

(1) THE PANEL DECISION VIOLATES THE REQUIREMENTS IMPOSED BY THE UNITED STATES SUPREME COURT IN CELOTEX CORP. V. CATRETT, 477 U.S. 317, 106 S.Ct. 2548, 91 L.E.2d 265 (1986) IN THAT THE PANEL DECISION ALLOWS THE EXISTENCE OF EVIDENCE SUPPORTING PLAINTIFFS' CASE TO BE SUPPRESSED BY THE OPPOSITE PARTY.

The leading case on summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.E.2d 265 (1986). Celotex states that the moving party need not negate every possible theory which might conceivably support the non-moving party's case, but rather requires that the parties are to go through discovery to determine what theory or theories of recovery are present. Once that is established, the Defendant may move for Summary Judgment attacking the theory or theories actually being advanced by the Plaintiff. It is not necessary for the Defendant to negate any hypothetical avenue of recovery not being advanced by Plaintiffs. The Defendant, however, must show an absence

of at least one essential element of the theory being advanced by Plaintiff, in order to prevail on the motion.

When opposing a Motion for Summary Judgment, it is not necessary for the evidence of the non-moving party to be "in a form that would be admissible at trial in order to avoid summary judgment." Celotex, 477 U.S. at 324. In the instant case, the Azor family obtained the services of James Lance, Ph.D. as an expert witness on swimming pool safety issues. The Azors filed the affidavit of Dr. Lance in opposition to the Motion for Summary Judgment, to show that the motel owners were negligent in the maintenance and supervision of the use of the subject pool (R5-137-2) and that the "negligent supervision and maintenance of the subject pool . . . was a contributing cause of the near drowning of Miguel Azor" . . . (R5-137-2).

However, the motel owners contend that the Lance affidavit is conclusionary and, therefore, insufficient to defeat their motion. The motel owners took the discovery deposition of Dr. Lance who identified with specificity the acts of negligence of the motel owners:

Q: Would you agree with me that the fencing was not causally related?

A: I think it blocked visibility. You had to be right up to the fence to see over it. If you walked back, you could not see the water.

Q: I understand that. Given the facts of this case, would you agree with me that regardless, the fence was not causally

related to any aspect of this near drowning? Why do you feel the fence was causally related to this episode?

A: A person could be in the water and you could be back a few feet and you wouldn't even know they were there. You cannot see the water.

Q: I understand that. Are you aware of any one who would have been in a position to have seen this child drown but for the fence?

A: This may be getting into another area. There is no room, no door, no office, no anything that you can look out and see that pool. It is an isolated pool. Now we are talking about location. It is an isolated pool. It is a very private spot.

Q: I understand that.

A: The fence contributes to that, not being able to see into the water itself.

Q: I mean facts specific here as concerns the facts of this case, wherein the boy had entered the fencing, was sitting down there next to the pool, there were other people in the pool. You cannot say this fencing in any way contributed to his near drowning episode, can you?

A: I can. I think if someone would have seen what happened

they possibly could have saved the boy. (Lance deposition, page 46-47). (Record Excerpt No. 8, pp. 46-47).

Q: Assume that that is the Florida legal definition and duty. Do you have an opinion as to whether or not that owner of the pool involved in this case and operator of the pool involved in this case did or did not use reasonable care to avoid this sort of accident that occurred to Miguel Azor? (Colloquy of Counsel deleted)

The witness: I feel they were negligent under those terms. Okay? That is all.

Q: Do you have an opinion as to whether or not the pool owners in this case failed to use reasonable care to prevent harm to users of the pool by failing to have a life guard?

A: I feel that they did. (Lance deposition, page 70-71). (Record Excerpt No. 8, pp. 70-71).

Q: You indicate reasonable care. If I were in any motel in the state of Florida of like size and it does not have a life guard next to its pool, are they unreasonable and all negligent?

A: I would like to have time to go around to a lot of hotels

> in the area of Kissimmee where this hotel is and see how many pools are as isolated as this one is. Location is the whole thing or a big part of it. Most pools have the motel wrapped around them where the rooms look out towards that area which makes it much safer. An isolated pool in an isolated area that is enclosed like that where you can't see the water from anywhere, that is where I think they have got their real problem. (Lance deposition, page 71-72). (Record Excerpt No. 8, pp. 71-72).

What did the motel owners do in light of the foregoing testimony of Dr. Lance which was obviously unfavorable to their side of the case? The answer is they suppressed the evidence. Defendants failed to file the original deposition of Dr. Lance with the court, and since that time have engaged in an effort to hide the deposition and prevent it from being used in this case, while simultaneously arguing that the Lance affidavit is not specific enough.

The motel owners took the deposition of Dr. Lance on February 19, 1993. The transcription of the deposition of Dr. Lance was completed on or about March 11, 1993 and the original of said deposition was mailed to their lawyer. The trial court granted Defendants' Motion for Summary Judgment on or about March 16, 1993. The motel owners had the original deposition of the expert witness, James E. Lance, Ph.D., in their possession at the time the trial court granted the Motion for Summary Judgment, but never filed same with the trial court or this

court.

> FRAP 10(e) states as follows:
> If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth.
>
> If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

The Azors requested via certified letter that Defendant motel owners file the original of Dr. Lance's deposition, but the motel owners refused. The Azors then filed a Motion to Supplement Record with the trial court, asking that the trial court order the deposition of Dr. Lance to be made a part of the record. In addition, the Azors transmitted a duplicate of the deposition of Dr. Lance to the trial court. The trial court denied the Motion to Supplement the Record and returned the duplicate of the deposition of Dr. Lance, unfiled. The Azors then filed a motion asking this Court to supplement the record to include this deposition. That motion was denied as well. The motel owners continue to keep the original transcript of this

deposition in their possession.

Defendants argued at the trial court level that Plaintiffs themselves should have taken a second deposition of their own expert, solely for the purpose of filing same with the court. As this expert witness would be testifying as a live witness at trial, such an exercise would be both futile and contrary to normal litigation practice. Normally, the Defendant takes the deposition of the Plaintiffs' expert. Likewise, the Plaintiff takes the deposition of the Defendants' expert. The purpose of these depositions is to learn what each respective expert will testify at the time of trial, as part of the discovery process. Dr. Lance was made available to Defendants for such a discovery deposition. The deposition was transcribed by the court reporter and the original transcript of the deposition was sent to the attorney for Defendants. Defendants' argument that Plaintiffs should have taken a second deposition to file in the case is absurd. The deposition of Dr. Lance is evidence in this case. It does not belong to Defendants (or to Plaintiffs for that matter) any more than material evidence in any case belongs to one of the litigants. The deposition is evidence which belongs to the court. The motel owners are engaging in legal gamesmanship of the worst sort by their tactics regarding the Lance deposition.

In the past, it was the practice for the original transcript of a deposition to be sent by the court reporter directly to the court, whereas attorneys for each side could order a copy for themselves. Several years ago the practice was changed in order to save space in the clerk's office. The practice then became

that the attorney taking the deposition was mailed the original transcript of the deposition, to be held in his file until it was turned over to the court at the time of trial or other such occasion as would be appropriate for use of the deposition. A motion for summary judgment would be such an occasion. Similarly the procedure also changed for interrogatories and answers to interrogatories, requests for production of documents and responses thereto and other types of discovery pleadings. Unfortunately this change in practice made it possible for a litigant to attempt to exclude from the record materials detrimental to his side. That is what has occurred in this case.

One may ask, why would a litigant do such a thing? The answer is obvious. The deposition of Dr. Lance clearly demonstrates that questions of material fact are present which should preclude the entry of summary judgment against the Azors in this case. An examination of the docket shows that the motel owners filed numerous depositions in their possession with the trial court because the originals of those depositions were in their possession, yet they refuse to file the Lance deposition. The panel decision not only affirmed the decision of the trial court, but granted the motion of the motel owners to strike references to Dr. Lance's deposition found in the Azors' appellate briefs. The panel decision ratified the action of the motel owners in "hiding" the deposition of Dr. Lance and preventing it from being considered in this case. The failure to consider the deposition of Dr. Lance is a miscarriage of justice and violates both the letter and intent of the Celotex decision:

> We do not mean that the non-moving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the non-moving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the non-moving party to make the showing to which we have referred. Celotex, 477 U.S. at 324. (Emphasis supplied).

We respectfully submit that the game of "hide and seek" the motel owners have played with the deposition of Dr. Lance, and the ignoring of this misconduct by both the trial court and the panel of this court hearing this case is sufficient reason for this court to grant the Writ of Certiorari in of the instant case. Our position as to the testimony of Dr. Lance can best be summed up by a quotation found in the concurring opinion of Justice White in the Celotex case:

> Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Celotex, 477 U.S. at 328.

The case at bar is one in which justice has been denied to Miguel Azor and his family on the thinnest of legal technicalities. The crucial evidence

demonstrating negligence on the part of the motel owners is in a deposition, the original of which is in the possession of the Defendants' lawyer. That deposition was never filed, yet, the evidence exists nonetheless. The motel owners knew of the existence of the testimony of Dr. Lance at the time the summary judgment motion was pending. The trial court, and now the United States Court of Appeals for the Eleventh Circuit also know of the existence of this testimony. Since the Azors have "named a witness to support (their) claim, summary judgment should not be granted without (the motel owners) somehow showing that the named witness' possible testimony raises no genuine issue of material fact." Dr. Lance is a witness known to provide testimony supportive of the Azors, thus the burden is on the motel owners to show Dr. Lance's testimony raises no genuine issue of material fact.

We respectfully request that this court reverse and remand the instant case to the district court and instruct the district court to make the deposition of Dr. Lance part of the record in this case, and instruct the district court to reconsider the summary judgment motion filed by Defendants taking into consideration the existence of the deposition of Dr. Lance.

(2) THE PANEL DECISION AFFIRMING THE OPINION OF THE TRIAL COURT GRANTING SUMMARY JUDGMENT ON THE ISSUE OF FORESEEABILITY VIOLATES BINDING PRECEDENT AS ESTABLISHED BY KEATING V. JONES DEVELOPMENT OF MISSOURI, INC., 398 F.2d 1011 (5th Cir. 1968).

The trial court granted the motel owners' Motion for Summary Judgment

because the trial court did "not find that the consequences which occurred in this case were reasonably foreseeable to Defendants." (R5-143-13). The only authority the trial court cites for this position is a hornbook, W. Prosser & W. Keeton, The Law of Torts §42, at 273 (5th ed. 1984). No Florida case is even discussed, let alone cited, on this critical issue in the case. However, this finding on the issue of foreseeability as a matter of law by the trial court is contrary to a decision of the United States Court of Appeals for the 5th Circuit, which is binding authority, on the trial court.

Keating v. Jones Development of Missouri, Inc., 398 F.2d 1011 (1968) is, from a legal standpoint, on "all fours" with the instant case. In Keating, Paul P. Keating, III, a six year old at the time of the incident, was injured while swimming in a motel pool in Florida. After diving into the water, young Keating was swimming face down toward the side of the pool when another guest jumped backwards off the diving board striking young Keating in the leg. The impact was so severe that Keating could not make it to the side of the pool without assistance. The Keating family filed suit against the motel (the guest who dived on top of young Paul Keating fled and was unable to be located). The allegations of negligence against the motel were:

(1) Failure to provide supervisory attendants about the pool;
(2) Failure to use proper safety equipment; and
(3) Failure to instruct divers and swimmers in exercise of due care.

The trial court granted summary

judgment against the Plaintiffs in the Keating case on the twin theories that the motel could have taken no precaution to control the actions of a diver, and that the event must be considered an isolated occurrence beyond the foreseeability of the motel owner.

In reversing the decision of the trial court, the 5th Circuit observed as follows:

> The district court below apparently reasoned that since the record is void of any evidence of horseplay prior to the accident, the Defendant was not negligent as a matter of law. This again is related to the question of foreseeability, which we believe is a matter for the jury to decide. For example, even in the absence of horseplay a life guard could have increased the pools' safety quotient by timing dives and by directing swimming traffic. The duty to provide supervision does not have as a condition precedent a history of boisterous conduct. This may be one element of negligence, but it is not the only element to be considered. Keating at 1014, 1015. (Emphasis supplied).

Compare and contrast the facts of the Keating case to the facts of the case at bar. Like young Paul Keating, Miguel Azor was a child who was a business invitee on the premises of the motel owners, and in use of the swimming pool provided by the motel owners as an inducement to get people to stay at their motel. Instead of the three allegations of negligence listed above made by the Plaintiffs in Keating, the Azors contend that four acts of negligence were present

in the instant case:

(1) Failure to have an attendant on duty at the pool or near by at the time of the incident;
(2) Failure to have a closed circuit television system or other monitoring device through which the motel managers and or Plaintiffs could detect problems at the pool area;
(3) Locating the pool in an isolated area and the erection of an opaque fence around the pool which made it impossible for anyone to see inside the pool area from the outside;
(4) Violation of the applicable Department of Health and Rehabilitative Services regulations in effect at the time.

Are the facts of the instant case so different from the Keating case that summary judgment is mandated in favor of the motel owners herein, whereas it was reversible error to grant summary judgment to the motel owners in Keating? The case at bar was decided on foreseeability grounds, as was Keating. Like Keating, the summary judgment granted by the trial court in the case at bar should be reversed.

The motel owners have argued that it is the conduct of Yvonne Azor which was not foreseeable to them. However, by making this statement the motel owners reveal the fallacy in their reasoning. What they attempt to do by this seemingly innocuous argument is impute whatever negligence may be applicable to Yvonne Azor onto the injured minor child, Miguel Azor. Pretermitting the question of

Florida law as to whether or not an eight year old child can be negligent at all, there is absolutely no evidence in the record of any negligent act done by Miguel Azor. Hence, the motel owners seek to smear onto Miguel Azor whatever negligence, if any, they can attribute to his mother, Yvonne Azor, through their argument of "unforeseeability" of Yvonne Azor's actions. If Yvonne Azor were not the mother of Miguel Azor, under the motel owners' own arguments, Yvonne Azor would be a joint tortfeasor along with them. As long as some evidence of negligence exists as to each of these various theoretical Defendants (including Yvonne Azor, in this hypothetical model) it would be up to a jury to decide the amount of negligence (or no negligence) of each. As stated clearly by the Keating court:

> Negligence is seldom an enclave for trial judge finality. Negligence is a composite of the experiences of the average man and is usually confined to jury evaluation. Swimming pool actions provide no exception. Judges can claim no special competence to pass upon the safeguards appropriate to swimming pools. In fact, it is a safe assumption that they are used more by jurors than judges. We therefore find that the district court erred in not granting the Appellant a trial before his peers. Keating, at 1015.

Another compelling reason exists for reversal of the instant case. The finding by the trial court is premised upon the existence of a sign. However, the sign in question was obscured by a beach umbrella, a vending machine and a tree (see police photograph attached

hereto as Appendix "D", which is a duplicate of Record Excerpt number 9). The photograph of the subject sign depicts the view which one would have entering the pool through the gate which was used by the Azor family. The sign is not readable from that vantage point. Both Harold Azor and Yvonne Azor testified at their depositions that they did not see the sign. (See deposition of Harold Azor, page 54; also see deposition of Yvonne Azor, page 12). Another reference to the sign appears in the deposition of Angela F. Alpern, Crime Scene Technician of the Osceola County Sheriffs Office, who made the subject photograph. When asked if the rules and regulations of the pool were posted she replied "Okay. They're behind the Coke machine and an umbrella." (See deposition of Angela F. Alpern, page 6).

We respectfully ask the members of this court to examine of the photograph of the sign which the motel owners contend makes the near drowning of Miguel Azor unforeseeable, and which they say absolves them of any responsibility. If one is to decide this case on foreseeability grounds (and Petitioners respectfully submit that is the wrong way to decide this case) is it not at minimum a question of fact as to whether or not that sign can be seen? Given that the Keating case holds that foreseeability is a question of fact to be decided by the jury, given that the only evidence in the record concerning the Azors' viewing of the sign in question is that they did not see it, and given further that the sign is posted in a place where its visibility is obscured, should not the foreseeability issue be decided by a jury, rather than by the trial court as a matter of law?

CONCLUSION

There exists a final reason why this court should grant the Writ of Certiorari in this matter, and reverse the decision below. The decision is simply wrong. The decision of the trial court, which is affirmed without opinion by the panel decision, is a miscarriage of justice. The decision of the trial court allows the owners and operators of a motel to create a "man-trap" on their property, and evade their responsibility to an eight year old boy who was injured while using their swimming pool, even though substantial evidence exists that the negligence of the motel owners and operators caused or contributed to those injuries.

We respectfully request that this court grant the Writ of Certiorari vacate the panel decision. We ask that the case be sent back to the trial court for reconsideration of the summary judgment motion, and that the trial court be ordered to consider the deposition of James Lance, Ph.D., Plaintiffs' expert witness. Alternatively, we ask this Court to simply reverse and remand the case for a jury trial.

APPENDICES

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 93-2391

D. C. Docket No. 92-221-CIV-ORL-19

Harold Azor; Miguel Azor, an infant under the age of 14 years, by his natural guardians, Harold Azor and Yvonne Azor; and Yvonne Azor, individually,

Plaintiffs-Counterclaim defendants-Appellants,

vs.

Cardinal Lodging Group, Inc., Cardinal Industries, Inc., a/k/a Cardinal Industries, Incorporated, Red Bird Management, Inc., and Knights Inn East, Ltd.,

Defendants-Counterclaimants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

(February 22, 1994)

Before COX, Circuit Judge, JOHNSON, Senior Circuit Judge, and PAINE*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

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* Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-2391

HAROLD AZOR;
MIGUEL AZOR, an infant under the age of 14 years, by his natural guardians, HAROLD AZOR and YVONNE AZOR; YVONNE AZOR,

Plaintiffs-Counterclaim defendants-Appellants,

versus

CARDINAL INDUSTRIES, CARDINAL LODGING GROUP, INC., RED BIRD MANAGEMENT, INC., KNIGHTS INN EAST, LTD.,

Defendants-Counterclaimants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: **COX, Circuit Judge, JOHNSON, Senior Circuit Judge and PAINE*, Senior District Judge.**

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/ Emmett R. Cox
UNITED STATES CIRCUIT JUDGE

*Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

APPENDIX "C"

UNITED STATE DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

Case No. 92-221-CIV-ORL-19

MIGUEL AZOR, an infant under the age of 14 years, by his natural guardians, HAROLD AZOR and YVONNE AZOR; and HAROLD AZOR and YVONNE AZOR, individually,

Plaintiffs,

v.

CARDINAL LODGING GROUP, INC., CARDINAL INDUSTRIES, INC., a/k/a CARDINAL INDUSTRIES, INCORPORATED, RED BIRD MANAGEMENT, INC., AND KNIGHTS INN EAST, LTD.,

Defendants.

ORDER

This case comes before the Court upon the following matters:

1. Plaintiffs' Motion for Summary Judgment and Memorandum of Law in Support thereof (Doc. Nos. 93 and 94, filed August 31, 1992), Plaintiffs' Motion for Summary Judgment and Memorandum of Law in Support thereof (Doc. Nos. 94 and 95, filed August 31, 1992), Affidavit of Harold Azor (Doc. No. 98, filed August 31, 1992), Affidavit of Yvonne Azor (Doc. No. 99, filed August 31, 1992), Defendants, Cardinal Lodging Group, Inc., Cardinal Industries, Inc., a/k/a Cardinal Industries, Incorporated, Memorandum of

Law in Opposition to Plaintiffs' Motion or Summary Judgment and Exhibit A (Doc. No. 104, filed September 11, 1992), Defendants, Red Bird Management, Inc. and Knights Inn East, Ltd., Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and Exhibit A (Doc. No. 103, filed September 11, 1992) and Notice of Supplemental Authority in Support of Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment (Doc. No. 120, filed December 1, 1992).

Plaintiffs move for the entry of summary judgment on the Counterclaims of Defendants, Cardinal Lodging Group, Inc. and Cardinal Industries, Inc. a/k/a Cardinal Industries, Incorporated ("Cardinal"), and Defendants Red Bird Management, Inc. and Knights Inn East, Ltd. ("Red Bird"), against Plaintiffs Harold and Yvonne Azor alleging negligent supervision of their son, Plaintiff Miguel Azor. Defendants Cardinal and Red Bird base their Counterclaims on the Uniform Contribution Among Tortfeasors Act, Florida Statute §768.31, which provides that when a joint and severally liable tortfeasor is required to pay an amount in excess of his or her pro rata share of liability, such individual or entity may seek contribution from other joint and severally liable tortfeasors for the excessive amount.

Both parties recognize that Florida courts have limited Florida Statute §768.31 when a joint and severally liable tortfeasor sues the parents of an infant plaintiff for contribution. Joseph v. Quest, 414 So.2d 1063, 1065 (Fla. 1982); Woods v. Winthrow, 413 So. 2d 1179, 1181 (Fla. 1982); Chinos Villas, Inc. v. Bermudez, 448 So. 2d 1179, 1180 (Fla.3d DCA 1984). Any recovery in contribution

against a negligent parent is limited to the amount of available insurance coverage. Joseph, 414 So. 2d at 1965.

Although Plaintiffs Harold and Yvonne Azor submitted affidavits stating that they have no policy of insurance that would cover this action, Defendants maintain that Plaintiffs' conclusory statements regarding the lack of insurance coverage are insufficient to support a summary judgment motion. The Court granted Defendants more time for discovery on the issue of insurance coverage of Plaintiffs by extending the time at which the Court would take Plaintiffs' Motion for Summary Judgment under advisement (Doc. No. 121).

Defendants have not submitted any evidence rebutting Plaintiffs' assertions of no insurance coverage. Instead, Defendants filed supplemental authority to support their Counterclaim for contribution from Plaintiffs Harold and Yvonne Azor. However, the case submitted by Defendants, Gurney v. Cain, 588 So. 2d 244 (Fla. 4th DCA 1991), is distinguishable from the instant case.

The court in Gurney v. Cain held that a negligent parent was liable for contribution to the award of his non-negligent spouse. Id. at 246. After Mr. and Mrs. Cain's daughter drowned in the Gurney's swimming pool, Mr. and Mrs. Cain sued the Gurneys for negligence. Id. at 244-45. The Gurneys counterclaimed against the Cains for failure to supervise their daughter. Id. at 254. The jury assigned a percentage of fault to Mr. Cain and assessed no fault against Mrs. Cain. Id. In the third-party action for contribution, the Fourth District Court of Appeal found that Mr. Cain, a negligent parent, could be held

accountable for his share of the wrongdoing to the other parent - his spouse. Id. at 246. The court stated that it "would be unfair to the third party and a windfall to the negligent parent" to not hold Mr. Cain liable for contribution to the award to his spouse. Id.

The doctrine of interspousal immunity does not control over the Uniform Contribution Among Joint Tortfeasors Act, "where one tortfeasor seeks contribution from the tortfeasor-spouse of the injured person." Johnson v. School Board of Palm Beach Cty., 537 So. 2d 685, 686 (Fla. 4th DCA 1989). When parents sue in their own right and not on behalf of the child, the policy considerations articulated in Joseph v. Quest to protect parent-child family immunity, except to the extent of insurance coverage, are absent. Johnson, 537 So. 2d at 686.

Joseph v. Quest is still the law in Florida. Id. A defendant in a tort action brought on behalf of a minor plaintiff is barred from asserting a claim that exceeds the amount of the parent's liability insurance for contribution against a negligent parent of the minor plaintiff. Williams By Williams v. United States, 608 F. Supp. 269, 272 (S.D. Fla. 1985). Applying Florida law, the federal district court granted a parent's motion to strike the Government's counterclaim for contribution because the Government presented no evidence that the adult plaintiff suing on behalf of her minor child had liability insurance. Id. The court's ruling on the counterclaim for contribution did not preclude a finding that the mother's negligence contributed to the injuries suffered by her son. Id.

Because Defendants have not submitted evidence to refute the Plaintiffs' statements that they do not have insurance coverage, Plaintiffs' Motion for Summary Judgment as to Cardinal's Counterclaim (Doc. No. 93) and Plaintiffs' Motion for Summary Judgment as to Red Bird's Counterclaim (Doc. No. 95) are **GRANTED**. To the extent that a jury finds Plaintiffs Harold and/or Yvonne Azor negligent and charges them with a percentage of the liability, any recovery by Plaintiffs Harold and/or Yvonne Azor on their own claims in this action should be reduced accordingly. Id.

2. Defendants' Motion for Summary Judgment and Memorandum of Law in Support thereof (Doc. Nos. 115 and 116, filed December 1, 1992), Depositions of Harold Azor and Yvonne Azor (Doc. No. 123, filed December 3, 1992), Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment (Doc. No. 130, file December 14, 1992), Depositions of Thomas Barber and Angela F. Alpern (Doc. No. 134, filed December 18, 1992), Affidavit of James E Lance, Ph.D. (Doc. No. 137, filed January 4, 1993) and Depositions of Betty Hauser, Frank Pazicni and Kimberly Pazicni (Doc. No. 138, filed January 4, 1993).

STATEMENT OF FACTS

This lawsuit involves the near drowning of Plaintiff Miguel Azor who was eight and a half years old at the time of the incident on July 25, 1989. Miguel, his parents and two brothers were vacationing in Orlando. The family checked into Knights Inn in Kissimmee, Florida. In the late afternoon on July 25, 1989, while Mr. Azor went to the grocery store with his son, Jonathan, Mrs. Azor took the other two children, Miguel and Harold, Jr. to the motel's

pool. While at the pool, Harold, Jr. began to fall asleep, and Mrs. Azor needed to return to the motel room to put Harold, Jr. down for a nap. Miguel asked his mother if he could stay at the pool while she returned to the room. Mrs. Azor left Miguel sitting on a lounge chair near the deep end of the pool and reminded Miguel to stay out of the water since he was unable to swim. Mrs. Azor returned to the motel room with Harold, Jr. She left the motel room door open and returned once to check on Miguel at which time she found him sitting in the same position at the pool where she had left him.

When Mr. Azor returned from the grocery store, he asked Mrs. Azor where Miguel was because he had not seen him at the pool. Mrs. Azor went to the pool at which time Miguel was discovered at the bottom of the pool. Upon hearing Mrs. Azor scream, Kimberly Pazicni, a motel guest, swam to the place in the pool where Miguel was and pulled him from the bottom of the pool. Mr. Azor, a trained emergency medical technician, administered CPR to Miguel until the ambulance arrived.

Although there were motel guests at the pool at the time of this incident, no one saw how Miguel got into the pool. As a result of the near drowning, Miguel suffered severe brain damage and remains in a coma with little hope of recovery. Mr. and Mrs. Azor, on behalf of their son and in their own right, bring this negligence action against Defendants claiming that Defendants were responsible for the supervision and safety of their guests and breached the duty of care owed to Miguel. Specifically, Plaintiffs allege that Defendants breached the duty of care owed Miguel by failing to (1)

provide a lifeguard or any other attendant at the pool, (2) maintain and have on the motel premises, and at the pool, required and necessary pool safety and first aid equipment, (3) provide any kind of surveillance equipment at the pool and (4) erect a transparent fence, in lieu of the opaque fence which surrounded the pool at the time of the accident, so that persons would be able to look inside the pool area from outside. Plaintiffs maintain that Defendants' failure to provide the above are acts of negligence that contributed to Plaintiffs' loss.

Defendants maintain that the sole proximate cause and/or the independent intervening cause of the Plaintiffs' damages are the Plaintiffs' failure to supervise Miguel and/or the actions of Miguel. Defendants contend that the motel's pool and surrounding property were maintained and operated in a safe condition and complied with all governmental regulations. Within a few hours after Miguel was pulled from the pool, photographs of the swimming pool area were taken by Angela Alpern of the Osceola County Sheriff's Office (Doc. No. 116, Exhibits D and E). The pictures, which the parties agree accurately portray the Knights Inn pool area on the day of the accident, show the following: (1) entrance to the pool area and surrounding fence, (2) latch on the entrance gate to the pool area, (3) steps and railing at the shallow end of the pool, (4) warning sign affixed to the wall inside the pool area stating "NO LIFEGUARD ON DUTY" and "CHILDREN UNDER AGE 12 AND NON SWIMMERS MUST BE ACCOMPANIED BY A RESPONSIBLE ADULT," (5) shepherd's hook on the inside of the fence in the pool area, and (6) flotation line dividing the shallow and deeper ends

of the pool. Defendants contend that the condition of the swimming area as reflected by the pictures and the facts of this case indicate that Defendants were in compliance with the applicable statutes and regulations and that they did not breach any duty owed to Plaintiffs.

Plaintiffs originally filed this lawsuit on December 19, 1989 in the United States District Court for the Eastern District of New York. The case was then transferred to this Court based on the New York court's lack of personal jurisdiction over two of the Defendants and considerations of convenience of witnesses and the availability of many non-party witnesses.

CONCLUSIONS OF LAW

Summary judgment is authorized if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The moving party bears the burden of proving that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and resolves all reasonable doubt against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255; see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986).

Plaintiffs point out that the Eastern District of New York denied Defendants' first Motion for Summary Judgment on March 3, 1992. Recognizing that the prior denial of the summary judgment motion does not become "law of the case," Plaintiffs suggest that this Court should give the decision of the Eastern District of New York great deference. Additionally, Plaintiffs maintain that Defendants have failed to present any new evidence to support the present Motion for Summary Judgment; therefore, this Court should uphold the prior court's denial of Defendants' first Motion for Summary Judgment.

Further, Plaintiffs contend that because the issues of foreseeability, proximate cause and the standard of care are "vigorously contested," the Motion for Summary Judgment should be denied. Plaintiffs maintain that the jury should decide whether Defendants' actions or nonactions on July 25, 1989, give rise to a breach of a common law duty of care and/or applicable HRS regulations.

Judge Bartell of the United States District Court of the Eastern District of New York summarily denied Defendants' Motion for Summary Judgment stating in his "Memorandum - Decision and Order" of March 3, 1992 that "[t]he Court can not reach [the] conclusion [that there is no issue of fact involved] at the present time" (Doc. No. 130, Exhibit A). Judge Bartell's Order focused on the issues of transfer and of personal jurisdiction over Defendants Knights Inn and Red Bird. Therefore, this Court's consideration of the instant Motion is not limited by the previous court's ruling.

While the facts of this case are indeed tragic, the parties do not dispute

the facts that resulted in the near-drowning of Plaintiff Miguel. It is unrefuted that how Miguel ended up in the pool is unknown.

The duty of care that Defendants owed Plaintiffs, as guests of the motel, is one of landowners to business invitees. Crawford v. Miller, 542 So. 2d 1050, 1051 (Fla. 3d DCA 1989) ("The duty of a landowner to a business invitee is to maintain the premises in a reasonably safe condition and to warn the invitee of latent perils which are known or should be known to the owner but which are not known to the invitee or which, by the exercise of due care could not be known to him.") (citations omitted).

Plaintiffs have presented no record evidence that Defendants' premises were not in a reasonably safe condition on the date of the accident. In addition, there is no record evidence that Defendants failed to warn Plaintiffs of any latent perils that were known or should have been known to Defendants. Although Plaintiffs say that they do not remember seeing the sign which warned of no lifeguard and that non-swimmers and children under the age of twelve should be accompanied by a responsible adult, Plaintiffs do not dispute that the warning sign was present. Indeed, Plaintiff Mrs. Azor knew there was no lifeguard on duty when she took her children to the pool. (Deposition of Y. Azor, pp. 11-12).

The regulation which Plaintiffs contend Defendants violated is Rule 10D-5.111(1) promulgated by the Florida Department of Health and Rehabilitative Service ("HRS") pursuant to Florida Statute §514.021. Rule 10D-5.111(1) provides:

> All owners, managers, or other attendants in charge of a public swimming pool shall be responsible for supervision and safety of the pool. Attendants, if provided, shall have authority to enforce all rules, and shall be trained in first aid and the use of lifesaving apparatus.

Plaintiffs contend that Defendants' failure to provide a lifeguard or surveillance equipment at the pool area demonstrates a violation of the above rule. However, Plaintiffs focus on the first sentence of the above paragraph only.

When reading the two sentences in subsection (1) of Rule 10D-5.111 together, it is clear that pool attendants are not required. Further, a reading of all twelve subsections of the Rule give context to "[a]ll owners . . . shall be responsible for supervision and safety of the pool." Subsections (2) - (12) of Rule 10D-5.111 provide specifics on supervision and safety in terms of (2) lifesaving apparatus, (3) protrusions, extensions, obstructions, (4) pools covers and solar blankets, (5) chemical storage, (6) pool slides, (7) rim fillspouts, (8) posting of rules and regulations, (9) diving, (10) nightswimming, (11) lettering size for pool signs and (12) pool heaters.

The cases Plaintiffs cite for the proposition that Defendants have violated an applicable regulation that gives rise to negligence per se are factually distinguishable from the instant case. See Pickett v. City of Jacksonville, 20 So. 2d 484 (Fla. 1945) (The rules and

regulations requiring public swimming pools to have attendants in 1943 are not applicable to the instant case.); First Overseas Investment Corp. v. Cotton, 491 So. 2d 293 (Fla. 3d DCA 1986) (evidence supported a finding that the defendants violated six HRS rules regarding the treatment of the pool water and the maintenance of the filtration equipment). Plaintiffs have presented no record evidence demonstrating that Defendants have violated any rules or regulations governing the supervision and safety of the pool.

While the granting of summary judgment is a drastic measure, where there is no dispute on the facts, the Court may not pass onto the jury what is initially a question of law. Plaintiffs contend that because the issue of foreseeability is vigorously contested, the jury should decide the issue. Initially, however, foreseeability is a question of law addressed when considering "whether the policy of law will extend the responsibility for the conduct to the consequences which have in fact occurred." W. Prosser & W. Keeton, The Law of Torts §42, at 273 (5th ed. 1984). Then, foreseeability becomes a matter to submit to the jury as a question of fact. Id.

"An owner or occupier of a place of business is not an insurer of his customers' safety; rather he owes his customers only a duty to protect against those risks which are reasonably foreseeable." Westchester Exxon v. Valdes, 524 So. 2d 452, 455 (Fla. 3d DCA 1988) (citations omitted). The duty imposed upon landowners is one of "ordinary care." Hylazewski v. Wet 'n Wild, Inc., 432 So. 2d 1371, 1372 (Fla. 5th DCA 1983). Defendants warned against

leaving children under the age of 12 and non-swimmers alone at the pool without a responsible adult. To hold Defendants responsible for the consequences of guests who disobey warnings of obvious perils would be tantamount to holding Defendants strictly liable for the accidents that occur on the premises. This is contrary to the law in Florida. Therefore, the Court does not find that the consequences which occurred in this case were reasonably foreseeable to Defendants.

Upon consideration, the Court finds that there are no facts in dispute, and there is no evidence that Defendants' breached a duty of care to Plaintiffs which proximately caused Plaintiffs' injuries. Therefore, Defendants' Motion for Summary Judgment (Doc. No. 115) is **GRANTED**.

DONE AND ORDERED at Orlando, Florida this, 16th day of March, 1993.

/S/
Patricia C. Fawsett
United States District Judge

APPENDIX "D"



IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL AZOR, and infant under the age of 14 years, by his natural guardians, HAROLD AZOR and YVONNE AZOR; and HAROLD AZOR and YVONNE AZOR, individually	)	
Petitioners,	)	
vs.	)	**No._____**
CARDINAL LODGING GROUP, INC., CARDINAL INDUSTRIES, INC. a/k/a CARDINAL INDUSTRIES, INCORPORATED, RED BIRD MANAGEMENT, INC., and KNIGHTS INN EAST, LTD.,	)	
Respondents.	)	

STATEMENT

Pursuant to Rule 28.2 of the Rules of the Supreme Court, this statement certifies that the original and forty (40) copies of a Petition for Writ of Certiorari in above-styled case were deposited in a United States post office or mailbox, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States. This mailing took place in Atlanta, Georgia on the afternoon of Tuesday, August 30, 1994, within the time permitted by the Rules of the Supreme Court for the filing of a Petition for Writ of Certiorari in this case.

Respectfully submitted,

Ronald Arthur Lowry
Counsel for Petitioner

Sworn to and subscribed
before me this 30th day
of August, 1994.

Patricia M. Traeger
NOTARY PUBLIC

Notary Public, Cobb County, Georgia
My Commission Expires August 12, 1995

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL AZOR, an infant under the age of 14 years, by his natural guardians, HAROLD AZOR and YVONNE AZOR; and HAROLD AZOR and YVONNE AZOR, individually	)	
Petitioners,	)	
vs.	)	**No._____**
CARDINAL LODGING GROUP, INC., CARDINAL INDUSTRIES, INC. a/k/a CARDINAL INDUSTRIES, INCORPORATED, RED BIRD MANAGEMENT, INC., and KNIGHTS INN EAST, LTD.,	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I, Ronald Arthur Lowry, of counsel for the Petitioners Miguel Azor, an infant under the age of 14 years, by his natural guardians, Harold Azor and Yvonne Azor; and Harold Azor and Yvonne Azor, individually, do hereby certify that on this date I have served three (3) copies of the Petition for a Writ of Certiorari to the Court of Appeals for the Eleventh Circuit in the above-styled case upon the opposing party by depositing said three (3) copies of the Petition in a United Stated post office or mailbox, with first-class postage prepaid, addressed to counsel of record for Respondent at his post office address, to-wit:

Mr. Philip Turner King
20 N. Orange Avenue, Suite 1500
P.O. Box 712
Orlando, Florida 32802-0712

All parties required to be served have been served.

This 30th day of August, 1994.

Respectfully submitted,

Ronald Arthur Lowry
Counsel for Petitioner

Sworn to and subscribed
before me this 30th day
of August, 1994.

Patricia M. Traeger
NOTARY PUBLIC

Notary Public, Cobb County, Georgia
My Commission Expires August 12, 1995

OPPOSITION

BRIEF

SEP 30 1994
OFFICE OF THE CLERK

No. 94-0398

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL AZOR, an infant under the age of 14 years, by his natural guardians, HAROLD AZOR and YVONNE AZOR; and HAROLD AZOR and YVONNE AZOR, individually,

Petitioners,

v.

CARDINAL LODGING GROUP, INC., CARDINAL INDUSTRIES, INC., a/k/a CARDINAL INDUSTRIES, INCORPORATED, RED BIRD MANAGEMENT, INC., and KNIGHTS INN EAST, LTD.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

PHILIP TURNER KING, JR.
LINDA S. O'CONNOR
Fisher, Rushmer, Werrenrath, Keiner, Wack & Dickson, P.A.
20 N. Orange Avenue, Ste. 1500
Orlando, FL 32802-0712
407/843-2111
Attorneys for Respondents

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1) In a negligence case, may the District Court grant summary judgment despite the filing of expert testimony by the non-movant where the expert's opinion is conclusory and premised on pure speculation?

2) In a negligence case governed by Florida law, may the District Court address the issue of foreseeability as a question of law where there are no disputed issues of material fact?

CASE NO.: 94-0398

LIST OF PARTIES INCLUDING PARENT AND SUBSIDIARY CORPORATIONS

The following is a list of the parties and interested entities to this litigation. CNA Insurance Companies is not a legal entity and there is no parent corporation or subsidiary thereof.

American Casualty Company of Reading Pennsylvania (related entity of CNA Insurance Companies)

Harold Azor, Petitioner

Miguel Azor, Petitioner

Yvonne Azor, Petitioner

Cardinal Industries, Inc., a/k/a Cardinal Industries, Incorporated, Respondent

Cardinal Lodging Group, Inc., Respondent

CNA Casualty Company of California (related entity of CNA Insurance Companies)

CNA Casualty Company of Puerto Rico (related entity of CNA Insurance Companies)

Columbia Casualty Company (related entity of CNA Insurance Companies)

Continental Casualty Company (related entity of CNA Insurance Companies)

Knights Inn East, Ltd., Respondent

National Fire Insurance Company of Hartford (related entity of CNA Insurance Companies)

Red Bird Management, Inc., Respondent

Transportation Insurance Company (related entity of CNA Insurance Companies)

Valley Forge Insurance Company (related entity of CNA Insurance Companies)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES INCLUDING PARENT AND SUBSIDIARY CORPORATIONS ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT AND AUTHORITY 7

I. This case presents no issue appropriate for the Supreme Court of the United States' exercise of its discretionary jurisdiction. 7

II. The District Court was correct in granting Respondents' Motion for Summary Judgment given the record evidence and properly denied Petitioners' Motion to Supplement the Record with deposition testimony not part of the record when it entered summary judgment. 8

III. The Eleventh Circuit Court of Appeals was correct in affirming the District Court's entry of summary judgment where there was no genuine issue of material fact and no prima facie negligence claim under Florida law. 15

CONCLUSION 20

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

Cadarian v. Merrell Down Pharmaceutical, Inc., 745 F. Supp. 409 (E.D. Mich. 1989) 10

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) . . . 9, 10

Daiflon, Inc. v. Allied Chemical Corp., 534 F.2d 221 (10th Cir. 1976), *cert. denied*, 429 U.S. 886 (1976) 14

Jones v. National Distillers & Chemical Corp., 484 F. Supp. 679 (N.D. West Virginia 1979) . 10

Keating v. Jones Development of Missouri, Inc., 398 F.2d 1011 (5th Cir. 1968) . . . 7, 16, 17, 18

Mateo v. M-S Kiso, 805 F. Supp. 761 (N.D. Cal. 1991) 10

NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) 15, 16

Rice v. Sioux City Memorial Parks Cemetery, 349 U.S. 70 (1955) 8

OTHER AUTHORITY

Rule 10 of the Supreme Court of the United States . . 8

Federal Rule of Appellate Procedure 10(e) 14, 15

Federal Rule of Civil Procedure 56 . . . . . 6, 8, 9, 12

Local Rule 3.03(d) United States District Court, Middle District of Florida 13

Florida Department of Health and Rehabilitative Services Rule 10D-5.111(1)) 17

OPINIONS BELOW

The Eleventh Circuit Court of Appeals per curiam affirmed the District Court's entry of final summary judgment on the issue of liability in favor of the Respondents and denied Petitioners' motion for rehearing and suggestion of rehearing en banc. The courts' opinions are reproduced in the appendix to the AZORS' Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners seek this court's discretionary review pursuant to 28 U.S.C. §1254(1). The dispute in this case arises from the District Court granting Respondents' Motion for Summary Judgment filed pursuant to Federal Rule of Civil Procedure 56 and the affirmance thereof by the Eleventh Circuit Court of Appeals and whether the lower courts should have allowed the record on appeal to be supplemented under Federal Rule of Appellate Procedure 10(e).

STATEMENT OF THE CASE

I. On July 25, 1989, HAROLD and YVONNE AZOR, and their three children arrived at the Knights Inn motel in Kissimmee, Florida, after traveling by car from their New York home. (Deposition of HAROLD AZOR,

12/3/92, pages 24-25)[1] The AZOR children are MIGUEL, born May 30, 1981; Jonathan, born July 15, 1985 and Harold, Jr., born November 28, 1987. (Deposition of HAROLD AZOR, 12/3/92, page 8)

After checking into the motel, the children wanted to use the swimming pool. (Deposition of HAROLD AZOR, 12/3/92, page 30) Since HAROLD was not feeling well, YVONNE took the three children to the pool by herself about 4:00 p.m. (Deposition of HAROLD AZOR, 12/3/92, page 30; Exhibit B, page 1; Exhibit C, page 2) HAROLD and YVONNE testified MIGUEL loved to play in the water but he did not know how to swim. (Deposition of HAROLD AZOR, 12/3/92, page 14; Deposition of YVONNE AZOR, 12/3/92, page 9)

When YVONNE and the three children first went to the pool, all of them were in the water and stayed in the shallow end of the pool. (Deposition of Thomas Barber, 12/18/92, Exhibit 7 page 3) MIGUEL, however, kept trying to move towards the deep end. (Deposition of Thomas Barber, 12/18/92, Exhibit 7 page 3) YVONNE told him to

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[1]In preparing the record on appeal and accompanying docket sheet, no document numbers were assigned by the clerk of the United States District Court, Middle District of Florida to deposition transcripts filed in said court. All references to deposition testimony will be designated (Deposition of name, date filed, page).

Petitioners, MIGUEL AZOR, an infant under the age of 14 years, by his natural guardian, HAROLD AZOR and YVONNE AZOR, HAROLD AZOR and YVONNE AZOR, individually, plaintiffs in the District Court, will be referred to as the AZORS or Petitioners. Respondents, CARDINAL LODGING GROUP, INC., CARDINAL INDUSTRIES, INC. A/K/A CARDINAL INDUSTRIES, INCORPORATED, RED BIRD MANAGEMENT, INC., and KNIGHTS INN EAST, LTD., defendants in the District Court, will be referred to collectively as Respondents.

remain in the shallow area and stay with her. (Deposition of Thomas Barber, 12/18/92, Exhibit 7 page 3) Although MIGUEL did not know how to swim, he liked to hold his nose and go under the water and then jump back up. (Deposition of Thomas Barber, 12/18/92, Exhibit 7 page 5)

After YVONNE and the three children left the pool they returned to the motel room. (Deposition of YVONNE AZOR, 12/3/92, pages 21-22) At that time, HAROLD decided to go to a grocery store and Jonathan accompanied him. (Deposition of YVONNE AZOR, 12/3/92, page 23; Deposition of HAROLD AZOR, 12/3/92, page 31) After HAROLD and Jonathan left, MIGUEL complained he wanted to go back to the pool. (Deposition of YVONNE AZOR, 12/3/92, pages 25-26, 32-33) After a while, YVONNE agreed to go back to the pool area where she, MIGUEL and Harold, Jr., sat down on chairs next to the deep end of the pool. (Deposition of YVONNE AZOR, 12/3/92, pages 30-32, 38) YVONNE sat holding Harold, Jr., on her lap and MIGUEL sat in the chair next to her. (Deposition of YVONNE AZOR, 12/3/92, pages 30-32)

After a while, Harold, Jr., fell asleep and YVONNE decided to bring him back to the motel room. (Deposition of YVONNE AZOR, 12/3/92, pages 33-34) After MIGUEL insisted upon staying near the pool, YVONNE allowed him to remain by himself in the pool area so long as he promised to stay in his chair. (Deposition of YVONNE AZOR, 12/3/92, pages 35-36) MIGUEL told his mom, "Ma, let me stay here. I be OK," so YVONNE left him stating she would be, "right back." (Deposition of YVONNE AZOR, 12/3/92, page 34) YVONNE knew at the time she left MIGUEL at the pool there was no lifeguard present. (Deposition of YVONNE AZOR, 12/3/92, pages 11-12)

After YVONNE returned to the motel room, she went back to the pool to check on MIGUEL and found him sitting in the chair where she left him. (Deposition of YVONNE AZOR, 12/3/92, pages 35-36) YVONNE again told MIGUEL not to go in the water and to "be careful." (Deposition of YVONNE AZOR, 12/3/92, page 36) She left the motel room door open in case she heard anything. (Deposition of YVONNE AZOR, 12/3/92, page 36) When HAROLD and Jonathan returned, MIGUEL was not at the pool and YVONNE went back to check on him. (Deposition of YVONNE AZOR, 12/3/92, pages 36-37) She did not see him in the shallow end and went to the deep end of the pool where she saw him face down on the bottom. (Deposition of YVONNE AZOR, 12/3/92, pages 37-39) YVONNE screamed when she saw MIGUEL, and a woman, later identified as Kimberly Pazicni, who was in the shallow end of the pool, immediately dove down and brought MIGUEL up to the surface and out of the water. (Deposition of YVONNE AZOR, 12/3/92, page 41; Deposition of Kimberly Pazicni, 1/4/93, page 12) HAROLD, who is an emergency medical technical, appeared and immediately began administering CPR to MIGUEL. (Deposition of HAROLD AZOR, 12/3/92, pages 5-6, 40-41) An ambulance then arrived and took MIGUEL to the hospital. (Deposition of HAROLD AZOR, 12/3/92, pages 42-43) As a result of the incident, MIGUEL suffered severe injuries and remains in a coma.

At the time of the incident, the water in the pool area was clear. (Deposition of Kimberly Pazicni, 1/4/93, page 9; Deposition of Thomas Barber, 12/18/92, Composite Exhibit 5) A shepherd's hook and lifesaving ring were present in the pool area. (Deposition of Thomas Barber, 12/18/92, Composite Exhibit 5) There was also a sign in the pool area setting forth rules and regulations of the pool which warned,

"NO LIFEGUARD ON DUTY" and "CHILDREN UNDER AGE 12 AND NON-SWIMMERS MUST BE ACCOMPANIED BY A RESPONSIBLE ADULT." (Deposition of Thomas Barber, 12/18/92, Composite Exhibit 5)

II. On March 17, 1993, the District Court entered final judgment in favor of the Respondents, (R. 5-144-1)[2], pursuant to its order granting Respondents' motion for Summary judgment. (R. 5-143-1) (Pet. App. C)[3] The District Court stated Respondents placed a sign warning persons against leaving children under the age of 12 and non-swimmers alone at the pool without a responsible adult present and determined it was not foreseeable the warnings would not be obeyed. (R. 5-143-13, 14) (Pet. App. C-12-13) The District Court also found there were no disputed issues of material fact and no evidence Respondents breached a duty of care owed to the AZORS which proximately caused MIGUEL's injuries. (R. 5-143-14) (Pet. App. C-13)

The AZORS filed their Notice of Appeal to the Eleventh Circuit Court of Appeals on April 8, 1993. (R. 5-146-1). On July 15, 1993, Petitioners filed in the District Court a motion to supplement the record with the deposition transcript of James H. Lance, Ph.D., (R. 5-157-1), which the District Court denied. (R. 5-164-1)

The AZORS also filed a motion to supplement the

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[2]Record references will be to the record on appeal as prepared by the clerk and designated (R. R-Vol-Doc page).

[3]References to Petitioners' appendix are designated (Pet. App. page number). References to Respondents' appendix are designated (Res. App. page number).

record in the Eleventh Circuit Court of Appeals which was denied. The Eleventh Circuit Court of Appeals on February 22, 1994, affirmed the District Court's entry of final summary judgment. (Pet. App. A-1) The AZORS filed a Petition for Rehearing and Suggestion of Rehearing en banc which the Eleventh Circuit Court of Appeals denied. (Pet. App. B)

SUMMARY OF THE ARGUMENT

I. This case presents no issue proper for the court's exercise of its power of supervision. The Petitioners merely challenge the District Court's conclusion on a question of law.

II. The District Court's decision and the Eleventh Circuit Court of Appeals' affirmance thereof are not in violation of *Federal Rule of Civil Procedure 56* and the interpretative case law thereof. Under Federal law a summary judgment can be granted despite the filing of testimony by an expert where said testimony is conclusory and based on speculation. The Petitioners chose to file an affidavit of their expert witness, James E. Lance, Ph.D., in opposition to Respondents' Motion for Summary Judgment in the District Court. Lance's affidavit stated nothing more than conclusions of law without any specific facts.

The Respondents have never suppressed any evidence. After receiving a copy of the deposition transcript of their expert witness taken some two months after the District Court deadline for filing documents in opposition to the motion for summary judgment, the Petitioners made the decision not to file said transcript. Moreover, Lance's deposition testimony creates no genuine issue of material

fact.

III. The District Court properly entered summary judgment premised on the non-existence of any issue of material fact and in the absence of a prima facie negligence action. There is no evidence Respondents violated any HRS regulations, failed to use reasonable care to maintain the pool in a reasonably safe condition or failed to warn of any hidden dangers. Respondents did not breach any duty owed to MIGUEL AZOR under Florida law. *Keating v. Jones Development of Missouri, Inc.*, 398 F.2d 1011 (5th Cir. 1968), is not only factually distinguishable from the instant case but the Florida HRS regulations have changed since the decision therein.

ARGUMENT AND AUTHORITY

I. This case presents no issue appropriate for the Supreme Court of the United States' exercise of its discretionary jurisdiction.

The Supreme Court of the United States should not grant certiorari as there is no reason for an exercise of this court's power of supervision. Petitioners simply challenge the District Court's conclusion of law in a negligence action. The case presents no novel question of law. What is involved is a dispute between the parties as to whether there was a breach of duty owed under Florida law by Respondents to MIGUEL AZOR. The decision of the Eleventh Circuit Court of Appeals affirming the District Court's entry of final summary judgment in favor of Respondents does not conflict with the decision of another court of appeals on the same matter. The Eleventh Circuit

Court of Appeals did not decide a federal question nor does its decision involve an important question of federal law. The decision does not depart from the accepted and true course of judicial proceedings, nor does it sanction such a departure by the District Court, to call for an exercise of this court's discretionary jurisdiction. *See Rule 10 of the Supreme Court of the United States.*

This case is nothing more than Petitioners' disagreement with the District Court's decision on a question of law. Certiorari should not be granted except in cases where the issues are of *public* importance as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion and authority between the courts of appeal. *Rice v. Sioux City Memorial Parks Cemetery*, 349 U.S. 70 (1955). There is no conflict between circuits in this case nor are the issues involved of public importance. As no special or important reasons exist for this court to review the instant case, this court should deny the AZORS' Petition for Writ of Certiorari.

II. The District Court was correct in granting Respondents' Motion for Summary Judgment given the record evidence and properly denied Petitioners' Motion to Supplement the Record with deposition testimony not part of the record when it entered summary judgment.

The District Court's ruling on Respondents' Motion for Summary Judgment and the Eleventh Circuit Court of Appeals' affirmance thereof do not violate *Federal Rule of Civil Procedure 56* and the interpretative case law. The trial judge clearly recognized summary judgment is a drastic

measure and understood the requirements of *Federal Rule of Civil Procedure 56* and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) as evidenced by the references thereto in the District Court's opinion. (R. 5-143-9) (Pet. App. C-8) *Federal Rule of Civil Procedure 56* and *Celotex Corp. v. Catrett* mandated summary judgment in the instant case. As the District Court acknowledged, where there are no disputed facts, the court "may not pass onto the jury what is initially a question of law." (R. 5-143-18) (Pet. App. C-12)

Respondents filed a Motion for Summary Judgment in the District Court on the issue of liability contending there were no genuine issues of material fact and as a matter of law Respondents were not responsible for the damages sustained by MIGUEL AZOR in nearly drowning in the pool on the Respondents' property. Under Florida law, Respondents did not owe MIGUEL AZOR a duty to provide a lifeguard at the pool. Respondents did provide lifesaving equipment including a shepherd's hook and lifesaving ring and a large sign posted by the gate to the pool area which stated no lifeguard was on duty and all children under twelve (12) years old and non-swimmers were to be accompanied by an adult. In support of their motion, Respondents filed the deposition transcripts of a number of witnesses.

In opposition to Respondents' motion, the AZORS filed an affidavit of Dr. Lance, an alleged expert witness of pool safety issues. Dr. Lance's affidavit contained no facts and merely stated conclusions of law that the "negligent supervision and maintenance of the subject pool ... [by the Respondents] ... was a contributing cause of the near drowning of MIGUEL AZOR." Under the Federal Rules of Civil Procedure, summary judgment is not precluded simply because the non-movant produces an expert witness to support their position. *Cadarian v. Merrell Down*

Pharmaceutical, Inc., 745 F. Supp. 409 (E.D. Mich. 1989). Whether an expert's opinion has sufficient basis is a matter of law for the court to decide. *Cadarian v. Merrell Dow Pharmaceutical, Inc.*, 745 F. Supp. at 411. The court looks beyond the expert's ultimate conclusion and analyzes the adequacy of its foundation. *Cadarian v. Merrell Dow Pharmaceutical, Inc.*, 745 F. Supp. at 411. The court may grant a summary judgment against the party who relies solely on an expert's opinion that has no more basis than theoretical speculation and makes unsupported assumptions. *Jones v. National Distillers & Chemical Corp.*, 484 F. Supp. 679 (N.D. West Virginia 1979) Conclusory and speculative testimony is insufficient to raise genuine issues of fact to defeat a summary judgment and even when offered by an expert witness, conclusory opinions without specific facts cannot prevent a summary judgment. *Mateo v. M-S Kiso*, 805 F. Supp. 761 (N.D. Cal. 1991) Accordingly, the District Court properly granted Respondent's Motion for Summary Judgment despite the affidavit of James E. Lance.

Petitioners argue since they have a witness to testify as to Respondents' alleged negligence, *Celotex* required the District Court to deny summary judgment. This argument has no merit. Although Petitioners name James E. Lance, Ph.D., as a witness to support their claim, said witness' testimony raises no genuine issue of material fact. Assuming the deposition transcript of James E. Lance, Ph.D., had been filed in the District Court, his testimony does not support Petitioners' position Respondents were negligent in the maintenance and supervision of the pool area. First, James E. Lance, Ph.D., is not qualified to render an opinion as to whether the location of the pool and the fence surrounding the area combined with the lack of a lifeguard constitute negligent maintenance of the subject pool so as to have proximately caused the incident involving MIGUEL AZOR.

Lance is a lifeguard training instructor. (Deposition of James E. Lance, Ph.D., 2/19/93, page 13) He has no expertise in the area of pool design, motel management, a working knowledge of HRS Regulations regarding swimming pools or whether any motel pools in and around the Orlando/ Kissimmee area have lifeguards. (Deposition of James E. Lance, Ph.D., 2/19/93, pages 15, 39, 71) Lance could render an opinion in this case if it were a situation involving a lifeguard who was negligent in the supervision of the pool area but not as to whether the actions or inactions of the Respondents constituted negligence.

Lance has no first-hand knowledge as to surveillance systems at any motel pool, is not aware of any specific HRS regulation prohibiting the location of the pool in the instant case or the type fence used and never reviewed the applicable HRS rule 10D-5.111 before being retained in this lawsuit. (Deposition of James E. Lance, Ph.D., 2/19/93, pages 19, 39, 45) Lance claims the location of the pool area and type of fence contributed to the occurrence of MIGUEL AZOR's near drowning because if by some remote possibility someone had been standing outside the pool area but able to see into the pool area, MIGUEL AZOR could have been saved without sustaining any injury. (Deposition of James E. Lance, Ph.D., 2/19/93, pages 46-47) This is mere speculation on the part of Lance without any substantiating facts as there is no evidence anyone was around or would have notice MIGUEL AZOR in trouble but for the type of fence around the pool area. Even people in the pool area and in the pool itself did not see or hearing anything.

Lance also claims "most pools have a motel wrapped around them where the rooms look out towards the area which makes it much safer." (Deposition of James E.

Lance, Ph.D., 2/19/93, pages 71-72) The problem with this supposition is it assumes motel guests are paying attention to other guests in the pool area. This assertion is also speculative and insufficient to create an issue of fact as to whether Respondents were negligent.

Lance does not dispute HRS regulations do not require a lifeguard to be present at motel swimming pools. (Deposition of James E. Lance, Ph.D., 2/19/93, page 61) He just *personally* believes every pool should have a lifeguard. (Deposition of James E. Lance, Ph.D., 2/19/93, page 24) However, Lance can provide no basis for this opinion other than he believes this is what should be done. The Florida courts and HRS have clearly stated otherwise. There is nothing contained in Lance's deposition which would create an issue of fact as to whether Respondents were negligent in fulfilling their duty to use reasonable care to maintain the pool area in a reasonable safe condition. As Lance's opinion has no basis other than theoretical speculations and unsupported assumptions, the District Court would properly have granted summary judgment even if the deposition transcript of James E. Lance, Ph.D., had been part of the record.

Petitioners erroneously claim Respondents suppressed evidence in this case. This is a blatant misstatement of fact. Respondents filed their Motion for Summary Judgment with the District Court and Memorandum of Law in Support Thereof on December 1, 1992. The District Court entered an order on December 3, 1992, stating the court would take Respondents' Motion for Summary Judgment under advisement on January 4, 1993, and "until that date, adverse parties may file affidavits and other documents within the purview of *Federal Rule of Civil Procedure 56* in opposition to the motion." (R. 4-124-1) Petitioners had, therefore,

until January 4, 1993, to schedule and take the deposition of their expert, James E. Lance, Ph.D., order the deposition transcribed and file said transcript with the court if Petitioners wanted the deposition of their expert to be considered by the court when ruling on Respondents' Motion for Summary Judgment. Petitioners failed to take any such action and decided instead to rely on an affidavit of James E. Lance filed January 4, 1993.

Contrary to the contention of Petitioners that Respondents proposed Petitioners depose their expert a second time, the Respondents maintain if Petitioners had wanted deposition testimony of their expert in support of their brief in opposition to Respondents' Motion for Summary Judgment, they should have taken the same prior to the court deadline or, even thereafter, file the deposition transcript of James E. Lance upon receipt thereof.

In anticipation of trial, Respondents took the deposition of James E. Lance on February 19, 1993, a month and a half after the court deadline for filing documents in opposition to Respondent's Motion for Summary Judgment. The deposition transcript was completed on or about March 11, 1993. Upon receipt of the deposition transcript, Respondents had no duty or obligation under the Federal Rules of Civil Procedure to file said deposition transcript. The Petitioners upon receipt of their copy of the deposition transcript could have filed said transcript or sought permission from the District Court to file it since the January 4, 1993, deadline had passed. It was not incumbent upon the Respondents to file the deposition transcript as discovery materials are not filed as a matter of course in the District Court. *Local Rule 3.03(d), United States District Court, Middle District of Florida*, provides that "transcripts of oral depositions should not be filed unless

and until requested by a party or ordered by the court." Petitioners never requested the original deposition transcript of their expert be filed with the District Court.

The Respondents never suppressed any evidence. The term "suppressed" applies where one party withholds evidence from the opposing party and about which the other party has no knowledge. This clearly is not the situation in the instant case. Petitioners were aware of James E. Lance's testimony being present at his deposition and had a copy of the deposition transcript in their possession prior to the District Court ruling on Respondents' motion for summary judgment. Petitioners could have filed said transcript if they had wanted the District Court to consider this testimony. They chose not to do so. There has been no "suppression" of evidence in this case.

The District Court ruled on Respondents' Motion for Summary Judgment March 16, 1993. (R. 5-143-1) (Pet. App. C-1) In its order, the District Court specifically stated it relied upon certain documents in considering the Motion for Summary Judgement which did not include the deposition of James E. Lance. (R. 5-143-6) (Pet. App. C-5) Petitioners moved to supplement the record with said deposition. As the deposition of James E. Lance was not part of the record before the District Court and was not considered by the District Court in ruling on Respondents' Motion for Summary Judgment, said deposition could not be part of the record on the appeal to be considered by the Eleventh Circuit Court of Appeals. *See Daiflon, Inc. v. Allied Chemical Corp.*, 534 F.2d 221 (10th Cir. 1976), *cert. denied*, 429 U.S. 886 (1976).

Petitioners cite *Federal Rule of Appellate Procedure 10(e)* as support for their ability to supplement the record.

Federal Rule of Appellate Procedure 10(e) does not apply to the instant type situation but to circumstances where the record does not include those documents which were considered by the District Court or which were before the District Court when ruling on a matter. The record on appeal is to reflect what occurred in the District Court. The deposition of James E. Lance was never before the District Court. Consequently, *Federal Rule of Appellate Procedure 10(e)* provides no authority for making the deposition of James E. Lance, Ph.D., part of the record on appeal. Thus, the District Court as well as the Eleventh Circuit Court of Appeals acted properly in denying Petitioners' Motion to Supplement the Record.

III. The Eleventh Circuit Court of Appeals was correct in affirming the District Court's entry of summary judgment where there was no genuine issue of material fact and no prima facie negligence claim under Florida law.

The Eleventh Circuit Court of Appeals reviewed de novo the District Court's entry of summary judgment. *See NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990). The District Court found there was no dispute between the parties as to the facts resulting in the near drowning of MIGUEL AZOR. In its opinion, the District Court thoroughly discussed its conclusions of law. The Florida Department of Health and Rehabilitative Services' (HRS) current rules and regulations did not require pool attendants or lifeguards at motel swimming pools. The motel owners had a duty to maintain their premises in a reasonably safe condition and warn of any hidden dangers. The District Court found there was no record evidence of any violation of the HRS rules or

regulations governing supervision and safety of swimming pools and no evidence the pool was not in a reasonably safe condition. There was a warning sign posted in the pool area which stated no lifeguard on duty and cautioned non-swimmers and children under 12 years old were to be accompanied by an adult.

The District Court noted the issue of foreseeability initially is a question of law when considering whether the law will extend the responsibility for conduct to the consequences which have in fact occurred. YVONNE AZOR knew there was no lifeguard on duty when she left MIGUEL by himself in the pool area. The District Court reasoned to hold the Respondents liable for the consequences which resulted from YVONNE AZOR's conduct would be to hold them strictly liable for any incident which occurred on their premises which is not the law in the State of Florida. In its plenary review of the District Court's decision, the Eleventh Circuit Court of Appeals asked if any genuine issue of material fact existed or whether the Respondents were entitled to judgment as a matter of law. *See NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990) By affirming the decision, the Eleventh Circuit of Appeals apparently reached the same conclusions as the District Court.

The District Court's decision and the Eleventh Circuit Court of Appeals' affirmance thereof are not contrary to the opinion of Fifth Circuit Court of Appeals in *Keating v. Jones Development of Missouri, Inc.*, 398 F.2d 1011 (5th Cir. 1968) which is factually distinguishable from the instant case. Moreover, Florida HRS regulations have changed since the *Keating* decision. *Keating v. Jones Development* is not, therefore, as Petitioners claim "binding precedent" nor is it on "all fours" with this case.

Critical facts are different in the instant case from those in the *Keating* case. In *Keating*, there were no warning signs posted, no safety equipment available and the child was not left alone by his parents who stayed at the pool to watch him play but could have done nothing to prevent the child's injury. *Keating*, 398 F.2d at 1012, 1013. In the instant case, there was the required safety equipment available and a large sign at the pool area warning no lifeguard on duty and adults must accompany non-swimmers and children under 12. While in neither case was a lifeguard on duty, the applicable HRS regulations are different. The court in *Keating* relied on a Florida Supreme Court case decided in 1945 when absence of a lifeguard at a public municipal swimming pool was negligence. The HRS rule (Rule 10D-5.111(1)) applicable at the time of MIGUEL AZOR's incident does not require the presence of a lifeguard. The duty owed by the Respondents under present Florida law is to maintain the premises in a reasonably safe condition and to warn of any hidden dangers. There is absolutely no evidence of any HRS violation in this case and the Respondents warned their guests no lifeguard was on duty. There was no dangerous condition of which the AZORS were unaware that proximately caused MIGUEL's injuries.

The court in *Keating* never stated the question of foreseeability is always a matter for the jury to decide. The evidence in *Keating* indicted the motel failed to meet the minimum water safety requirements and the issue of foreseeability would be a question for the jury whether the incident which happened was reasonably foreseeable as a result of the motel owner's negligence. This is distinguishable from the case herein where despite knowing there was no lifeguard on duty and knowing MIGUEL did not know how to swim, YVONNE AZOR left MIGUEL by

the pool side unaccompanied by an adult. The Respondents having provided a warning sign, the District Court addressed whether as a matter of law the Respondents should be made responsible for consequences which resulted from YVONNE AZOR's actions. Clearly, the issue of foreseeability can be a question of law and, subsequently, a question of fact. When it is a question of law, it is proper for the court to decide the matter rather than a jury. For the reasons set forth above, the *Keating* decision is not "binding precedent" as maintained by the Petitioners.

It has been the Respondents' position throughout this case it was the actions of YVONNE AZOR which proximately caused MIGUEL's injuries. YVONNE AZOR allowed her eight year old son, a non-swimmer, to sit unsupervised in Respondents' pool area knowing no lifeguard was on duty. Petitioners erroneously contend this argument imputes YVONNE AZOR's negligence onto MIGUEL AZOR. This is not true. The Respondents' argument is simple. The AZORS filed a lawsuit against the Respondents alleging the Respondents' negligence proximately caused MIGUEL AZOR's injuries. The Respondents' position is there was no negligence on the part of Respondents which proximately caused MIGUEL AZOR's injuries and, therefore, they should not be held liable for said injuries. There has been no attempt by Respondents to place blame on MIGUEL AZOR for the negligence of YVONNE AZOR. The Respondents are not joint tortfeasors with YVONNE AZOR whose conduct was the *sole* proximate cause of MIGUEL AZOR's injuries. Accordingly, there was no prima facie case of negligence against the Respondents to submit to the jury in this instance and Respondents were entitled to judgment as a matter of law.

Petitioners maintain another compelling reason for reversal in the instant case is the sign with the warning was allegedly obscured by a beach umbrella, a vending machine and a tree. This is misrepresentation of the facts. There is only one entrance to the pool area. (Deposition of Betty Hauser, 1/4/93, pages 7, 22; Deposition of Kimberly Pazicni, 1/4/93, page 8; Deposition of Frank Pazicni, 1/4/93, pages 7, 11) The warning sign is located directly at the entrance of the pool area and is not behind a coke machine nor obscured by an umbrella. (Resp. App. A-1, A-2) The photograph identified as Appendice D-1 to the Petition for Writ of Certiorari is a view of the sign from outside the far corner of the pool area and not representative of the view of someone entering the pool area. Upon entering the pool enclosure, one walks by the sign. (Deposition of Kimberly Pazicni, 1/4/93, page 41) As the AZORS passed through the gate to the pool area, the sign was to their left side, and upon leaving the pool area, the sign was to their right side. The warning "No lifeguard on duty" is in large bold red lettering. (Resp. App. A-3)

Petitioners take the statement by Angela Alpern referenced in their petition out of context and misrepresent her testimony. Alpern was specifically looking at the photograph identified as Petitioners' Appendice D-1 when she replied the sign was behind the coke machine and umbrella. (Deposition of Alpern, 12/18/92, page 6) Alpern also testified one could see the sign while in the pool area. (Deposition of Angela Alpern, 12/18/92, pages 6, 7) While both HAROLD AZOR and YVONNE AZOR testified they did not see the sign, they do not dispute the sign was posted. Furthermore, the crucial fact remains YVONNE AZOR admitted she knew there was no lifeguard on duty at the time she left MIGUEL unattended in the pool area. There was no dangerous condition present of which Respondents failed to

warn the AZORS or of which the AZORS were unaware which proximately caused MIGUEL's injuries. Foreseeability is a question of law in this case which the District Court properly decided by summary judgment.

CONCLUSION

There has been no miscarriage of justice in the instant case. The District Court properly decided the issue of liability by summary judgment based on the present law in Florida. Florida law does not require pool attendants or a lifeguard at a motel pool. There is absolutely no evidence of negligence or breach of duty by the Respondents. Petitioners' expert premised his opinions on nothing more than speculation and conjecture.

Respondents pray the Court deny the AZORS' Petition for Writ of Certiorari as the case presents no issue appropriate for the Court's review and the District Court's holdings were not in error.

Respectfully submitted,

PHILIP TURNER KING, JR.
Florida Bar No.: 372439

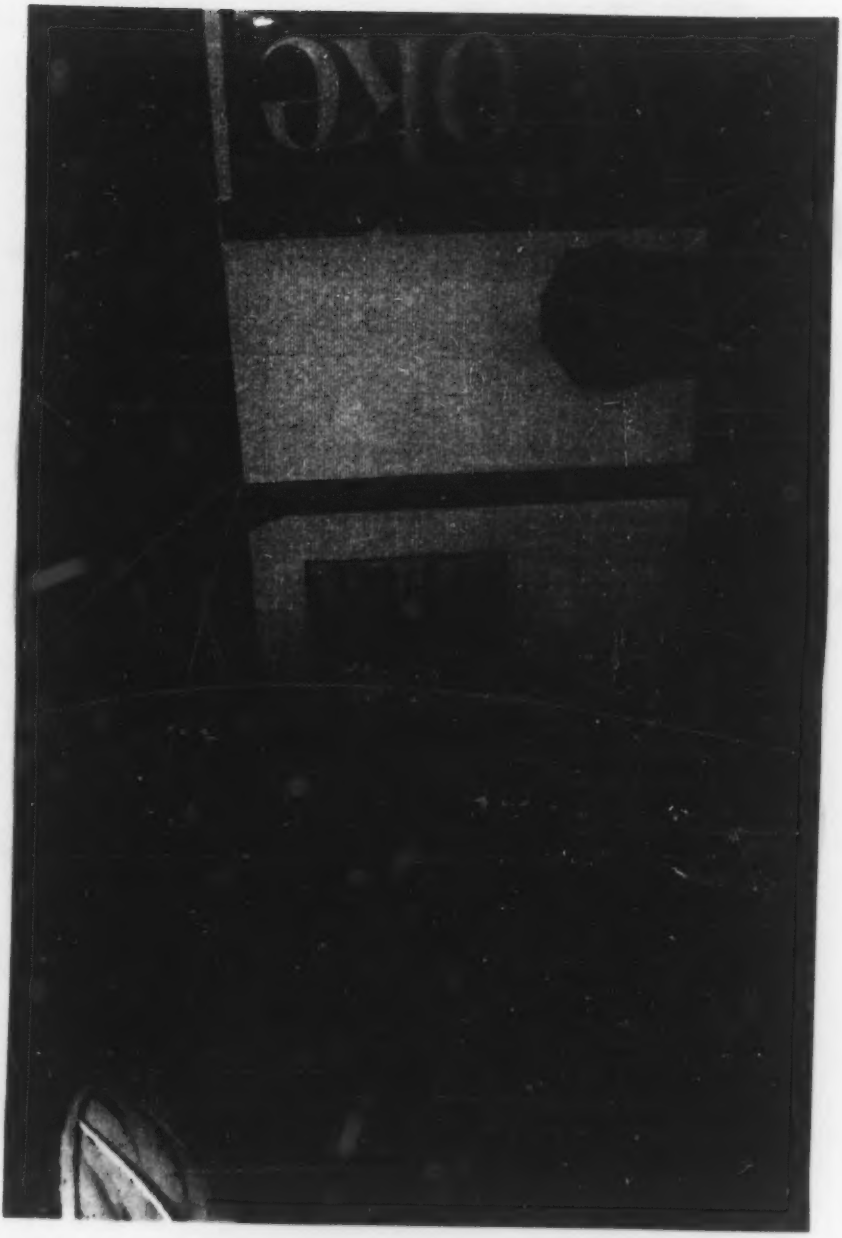
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APPENDIX

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APPENDIX



IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL AZOR, an infant under the age of 14 years, by his natural guardians, HAROLD AZOR and YVONNE AZOR; and HAROLD AZOR and YVONNE AZOR, individually,

Petitioners,

v.

No. 94-0398

CARDINAL LODGING GROUP, INC., CARDINAL INDUSTRIES, INC., a/k/a CARDINAL INDUSTRIES, INCORPORATED, RED BIRD MANAGEMENT, INC., and KNIGHTS INN, EAST, LTD.,

Respondents.

STATEMENT

Pursuant to Rule 29.2 of the Rules of the Supreme Court of the United States, this statement certifies the original and forty (40) copies of a Brief in Opposition to Petition for Writ of Certiorari in the above-styled case were forwarded by Federal Express mailing, prepaid, and properly addressed to the Clerk of the Supreme Court of the United States. Mailing took place in Orlando, Florida, on the afternoon of September 30, 1994, within the time permitted by the Rules of the Supreme Court of the United States for filing a Brief in

Opposition to Petitioners' Writ of Certiorari which was received by the undersigned on September 2, 1994.

Respectfully Submitted,

PHILIP TURNER KING, ESQUIRE
Attorney for Respondents

Subscribed and sworn to
before me this 30th
day of September, 1994.

Mary S. Barney
Notary Public

Personally known to me.

MARY S. BARNEY
Notary Public, State of Florida
My comm. expires February 16, 1996
Comm. No. CC175189

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL AZOR, an infant under the age of 14 years, by his natural guardians, HAROLD AZOR and YVONNE AZOR; and HAROLD AZOR and YVONNE AZOR, individually,

Petitioners,

v. No. 94-0398

CARDINAL LODGING GROUP, INC., CARDINAL INDUSTRIES, INC., a/k/a CARDINAL INDUSTRIES, INCORPORATED, RED BIRD MANAGEMENT, INC., and KNIGHTS INN, EAST, LTD.,

Respondents.

CERTIFICATE OF SERVICE

I, Philip Turner King, Jr., counsel for Respondents, CARDINAL LODGING GROUP, INC., CARDINAL INDUSTRIES, INC. a/k/a CARDINAL INDUSTRIES, INCORPORATED, RED BIRD MANAGEMENT, INC., and KNIGHTS INN, EAST, LTD., hereby certify that on this date I have served three copies of Respondents' Brief in Opposition upon the opposing party by forwarding said copies of the brief by Federal Express mailing, prepaid, addressed to counsel of record for Petitioners as his post office address, to wit: Ronald Arthur Lowry, Esquire, 305 Lawrence Street, Marietta, Georgia 30060.

All parties require to be served have been served.

DATED this 30th day of September, 1994.

Respectfully Submitted,

PHILIP TURNER KING, ESQUIRE
Attorney for Respondents

Subscribed and sworn to
before me this 30th
day of September, 1994.

Mary S. Barney
Notary Public

Personally known to me.

MARY S. BARNEY
Notary Public, State of Florida
My comm. expires February 16, 1996
Comm. No. CC175189